Editor's note: appeal filed, Civ.No. C-89-0314-P (W.D. KY, Nov. 27, 1989), aff'd, (July 18, 1991)

DONALDSON CREEK MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-439 Decided October 26, 1989

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming issuance of Notice of Violation No. 85-82-233-1 and Cessation Order No. 85-82-233-1. Hearings Division Docket Nos. NX 5-47-P and NX 5-48-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

   43 CFR 4.1273(c) requires that an appellant's brief to the Board shall state specifically the rulings of an Administrative Law Judge to which there is an objection, the reasons for such objections, and the relief requested. A brief that repeats verbatim the arguments made to the Administrative Law Judge after the hearing does not comply with this regulation because it does not state the reasons for the objections.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

   The Secretary of the Interior through OSMRE may issue notices of violation in states with approved programs, where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) and, after OSMRE issues a 10-day notice, the state fails to take action to ensure abatement of the violation.

3. Estoppel--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

Estoppel will not lie when the party asserting it is charged with knowledge of the requirements of a regulation, because the person is not ignorant of the true facts. OSMRE's failure to inform a permittee of a requirement to eliminate an underwater highwall by grading it to an appropriate contour does not constitute affirmative misconduct for purposes of estoppel.

4. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions

The requirement of 30 CFR 715.14(e) that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour is the proper remedial action to prescribe in a notice of violation issued to an initial regulatory program operation. Revising a notice of violation to prescribe this requirement, rather than that of 30 CFR 816.49(a)(9) applicable to a permanent program operation, is not a retroactive imposition of a new requirement.

5. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

30 CFR 715.14(e) is an initial program regulation that requires that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour. Compliance with a state permit allowing an underwater highwall does not excuse failure to comply with this regulation.

6. Estoppel--Surface Mining Control and Reclamation Act of 1977: Permits: Approval--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Approval of a permit application by a state regulatory authority is not litigation that would preclude subsequent issuance of a notice of violation by OSMRE under the doctrine of collateral estoppel.

7. Surface Mining Control and Reclamation Act of 1977: Discrimination: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

An Administrative Law Judge may refuse to take evidence on the issue of whether OSMRE failed to enforce a regulation against similarly situated operators, because the fact that OSMRE may not have enforced the regulation elsewhere or may have begun its enforcement of a regulation with a particular operator could not excuse the operator's failure to comply with its requirements.

8. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Appropriate contour." "Appropriate contour" in 30 CFR 715.14(e) is not synonymous with "approximate original contour," but the regulation requires that all highwalls be eliminated by grading.

APPEARANCES: George L. Seay, Jr., Esq., Frankfort, Kentucky, for appellant; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Donaldson Creek Mining Company (Donaldson) filed a petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller dated March 20, 1987, affirming the issuance of Notice of Violation (NOV) No. 85-22-233-1 and Cessation Order (CO) No. 85-82-233-1 and the civil penalties based on them. 43 CFR 4.1270. We granted the petition by order of May 13, 1987.

Glenn D. Wyatt, an inspector of the Office of Surface Mining Reclamation and Enforcement (OSMRE), conducted an oversight inspection of Donaldson's No. 1 Mine in Caldwell County, Kentucky, in September 1984.

On September 21, 1984, he issued a 10-day notice to the Commonwealth of Kentucky stating he had reason to believe that the permanent impoundment at the mine was in violation of Title 405, Kentucky Administrative Regulations [KAR], 405 KAR 1:130, for failure to eliminate all highwalls by grading to approximate original contour and of 405 KAR 1:220 because it was not constructed to provide adequate safety and access for proposed water users (Exh. R-1). 30 U.S.C. § 1271(a) (1982).

The Regional Administrator of the Kentucky Natural Resources and Environmental Protection Cabinet replied in October that it would not take action on the notice because the impoundment had been approved in Donaldson's permit 1/ and certified by a professional engineer as having been constructed according to plans. The Regional Administrator noted that it had given Donaldson a deadline of July 1, 1985, for the impoundment to fill to its projected level, at which level it would not present a safety hazard.

Wyatt issued a notice of violation on January 24, 1985, citing Donaldson's impoundment for a violation of 30 CFR 715.14(e) 2/ as well as the Kentucky regulations mentioned above and requiring that the violation be "eliminate[d] by grading the existing highwall to the appropriate contour. * * * [G]rading of all spoil & highwall should be complete to a point sufficiently below the projected low water elevation to be consistent with the approved post mining land use" (Exh. R-3). 3/ Grading was to begin by February 8, 1985, and be completed by April 24, 1985. When Wyatt returned on February 14, 1985, the site was inactive and no grading had begun, so he issued a CO for failure to comply with the notice of violation. 30 CFR 843.11(b)(1).

OSMRE issued notices of the proposed assessment of civil penalties for the NOV and the CO for $1,100 and $22,500 respectively on April 9, 1985.
Donaldson filed timely petitions for review, accompanied by prepayment of the proposed penalties, on May 10, 1985. 43 CFR 4.1151(a), 4.1152(b).

1/ Commonwealth of Kentucky Permit No. 017-0004 was issued on Nov. 20, 1979 (Exh. R-3, Narrative Summary), while the initial regulatory program was in effect. See 30 CFR 917.10. The Regional Administrator's letter said "we have reviewed the permit revision and find the permanent impoundment has been constructed according to the approved plans." See Exhs. P-24, P-25.

2/ 30 CFR 715.14(e), an environmental performance standard adopted as part of the initial regulatory program on Dec. 13, 1977, provides in part: "Permanent impoundments. Permanent impoundments may be retained in mined and reclaimed areas provided all highwalls are eliminated by grading to appropriate contour and the provisions for postmining land use (§ 715.13) and protection of the hydrologic balance (§ 715.17) are met."

3/ The inspector's statement attached to his report reads in part:

"State RA [regulatory authority] has approved impoundment. Operator and state feel that impoundment is acceptable and hope it will fill with water. Highwall was not eliminated prior to impoundment being closed in and allowed to partially fill with water. Approx. 35 feet of highwall remain exposed. The impoundment is approx two years old."

On August 15-16, 1985, Administrative Law Judge Miller conducted a hearing in Bowling Green, Kentucky.

At the outset of the hearing, counsel for OSMRE moved to amend the portion of the NOV and CO that specified what remedial action Donaldson was to take. See Gateway Coal Co. v. OSMRE, 84 IBLA 371 (1985).

> [W]e would like to request that you allow us to modify the notice of violation and modify the cessation order to conform it to Judge Flannery's decision, to change the corrective action, which allowed the highwall to be totally eliminated down to the water line, change that action to now require the highwall to be totally eliminated.

(Tr. 3-4). In September 1984, at the time the NOV was issued, OSMRE had been defending the permanent program regulation analogous to 30 CFR 715.14(e), 30 CFR 816.49(a)(9), which "would have allowed highwalls to be left under water," before Judge Flannery, U.S. District Court for the District of Columbia, OSMRE's counsel explained, so OSMRE decided to give Donaldson the benefit of the current policy even though the interim program regulation applicable to Donaldson's mine provided that all highwalls were to be eliminated by grading to appropriate contour (Tr. 2, 7-8). A month before the hearing, however, Judge Flannery remanded the permanent pro-gram regulation to the Department as "inconsistent with law," commenting that "the performance standards embodied in § 515(b), 30 U.S.C. § 1265(b), expressly require the elimination of 'all highwalls.'" 4/ "All we're trying to do at this point in time is conform our remedial action to what Judge Flannery ruled," counsel for OSMRE argued (Tr. 10).

Donaldson's counsel objected to the motion and requested that the hearing be postponed so that he could prepare its case in light of the change in OSMRE's position (Tr. 12-13). The Administrative Law Judge took the motion under advisement, regarding it as a question of law that could be addressed later in briefs, and ordered that the hearing proceed (Tr. 24-25). 5/ At

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4/ In Re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519, 1570-71 (D.D.C. 1985).

30 CFR 816.49(a)(9) provides: "The vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of highwall to provide adequate safety and access for the proposed water users." 48 FR 44005 (Sept. 26, 1983). See 48 FR 43999 (Sept. 26, 1983). The rule was "suspended insofar as it permits the retention of high-walls in permanent impoundments," 51 FR 41961 (Nov. 20, 1986), see 51 FR 41958 (Nov. 20, 1986), and reinstated in full effective July 11, 1988, as a result of the Circuit Court's decision reversing Judge Flannery (National Wildlife Federation v. Hodel, 839 F.2d 694, 759-60 (D.C. Cir. 1988)). 53 FR 21767 (June 9, 1988), see 53 FR 21765 (June 9, 1988).

5/ Counsel for Donaldson took "exception for appeal," stating:

"I believe that, if given an opportunity and had that opportunity, [I] could show the Court that the argument that is being made by OSM[RE] today

the conclusion of the hearing, the Administrative Law Judge required OSMRE's motion to be filed in writing with supporting reasons and provided Donaldson an opportunity to respond. He also permitted Donaldson to file a motion for a further hearing with supporting reasons and provided OSMRE a similar opportunity (Tr. 373).

Donaldson filed a motion to take additional proof on August 29, 1985, 6/ and OSMRE's motion was filed September 24, 1985. 7/ Donaldson responded on November 25, 1985. The original NOV and CO "ordered corrective action in accordance with 30 CFR 816.49(a)(9)," Donaldson stated, and argued that "an agency that promulgates a regulation and asserts a particular enforcement policy in consideration thereof cannot retroactively assert a new enforcement policy contrary thereto, except under very limited circumstances" (Memorandum in Response to Motion at 3), citing Phillips Pet. Co. v. Dept. of Energy, 449 F. Supp 760 (D. Del. 1978), and Retail, Wholesale & Department Store Union v. N.L.R.B., 466 F.2d 380, 390 (D.C. Cir. 1972). 8/ Donaldson argued further that OSMRE should be estopped under the tests set forth in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). Administrative Law Judge Miller granted both motions by order dated April 17, 1986, and subsequently set a second hearing for July 23, 1986.

At the July 1986 hearing, counsel for OSMRE moved to conduct a voir dire examination of the several witnesses assembled by counsel for Donaldson
in order to determine whether OSMRE would object to their testimony as irrelevant or cumulative (July 1986 Tr. 12-14). The Administrative Law

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fn. 5 (continued)
was not in fact the way the law was applied to my client and to other like situated operators in western Kentucky during the time period in question. * * * I think that I should be able to present to the Court the proof to
show that what was done here was not something in violation of the statute but was something that was done as an inter -- and was approved as an interpretation by OSM[RE] during the time period in question" (Tr. 25).
6/ "[T]he Petitioner moves the Court that in the event OSM[RE] is allowed to amend the remedial measures required; that the Petitioner should be given a reasonable opportunity to prepare additional proof and arguments to [rebut] this change in position, which is not merely a change in remedial measures required but also reflects a change in a different enforcement policy against this one (1) operation when compared with other operations similarly situated" (Motion at 3).
7/ "[T]he Respondent * * * moves that it be allowed to amend the corrective action required by the notice of violation and cessation order listed above to require that all of the highwall existing at Petitioner's mine site be eliminated by grading" (Motion at 1).
8/ "[C]ourts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests." Retail, Wholesale & Department Store Union v. N.L.R.B., supra at 390.

Judge granted the motion despite Donaldson's explanation that it needed this testimony

> to show that OSM[RE] has changed their policy and enforcement * * * [t]hat my client is being, if you will, discriminated against * * * [t]hat there are other people similarly situated not only in Kentucky, but even in other states and that OSM[RE]'s national policy has been different than that as applied to my client.

(July 1986 Tr. 14, 16). 9/ After questioning whether "that is a viable defense" and listening to argument about whether Donaldson could present as evidence documents relating to underwater highwalls at other sites, the Administrative Law Judge ruled:

> I am inclined to agree and do agree with Mr. Gault, that a series of isolated inspection reports and related documents on other mine sites have no valid bearing on the violation in the Donaldson Creek situation. So I will honor the objection to the exhibits. They will not be received.

(July 1986 Tr. 33). Counsel for Donaldson asked whether such a ruling would apply to testimony of Kentucky Cabinet employees concerning underwater highwalls that were approved by the State in permits for other sites in western Kentucky and the Administrative Law Judge said that was his decision (July 1986 Tr. 35-37). It was then agreed that Donaldson would "for the record * * * tender a written summary of those witnesses['] testimony" (July 1986 Tr. 38-39). Donaldson filed its Tendered Statement of Proposed Witnesses to the Administrative Law Judge along with its brief on October 20, 1986. OSMRE filed its responding brief on February 19, 1987, and the Administrative Law Judge issued his decision on March 20, 1987.

[1] Donaldson's 20-plus page brief on appeal to the Board is identical to that filed with the Administrative Law Judge after the hearing, except

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9/ The following interchange occurred during discussion of the motion for voir dire:

"Mr. Gault [counsel for OSMRE]: Your Honor, evidence is only rele-vant if it supports or tends to support [a] factual or legal defense for a specific situation. In this case a specific violation. I could almost demur to what Mr. Seay [counsel for Donaldson] has said. So what[?] He has not stated how that that [sic] type of evidence that he is talking about can either legally or factually raise a defense to this [O]ffice of [S]urface [M]ining violation for this mine site. I do not believe he could show that.

"Mr. Seay: I will accept his demur[rer], Your Honor, that OSM[RE] is treating my client differently than other people.

"Administrative [Law] Judge [Miller]: Of course they do. They pick the worst one they have and that is where they start. You ought to know that. With respect to the motion to voir dire, it is granted" (July 1986 Tr. 16).

for an additional seven-line item in the statement of facts stating that the
Administrative Law Judge refused to allow testimony from witnesses who would have testified to different standards applied by OSMRE to other operators allowing underwater highwalls (Brief at 2); a 27-line argument that the Administrative Law Judge erred by disallowing the testimony of the 15 witnesses on the Tendered Statement of Proposed Witnesses because their testimony would have been relevant to Donaldson's defenses of retroactive enforcement and unequal treatment (Brief at 18-19); and an additional five-line request for alternative relief that the Board remand the matter for taking this additional proof (Brief at 23). The other six arguments presented in the brief -- absence of a violation, estoppel, retroactive application of abatement requirements, collateral estoppel, unequal enforcement, and lack of OSMRE jurisdiction to take enforcement action -- are those specifically discussed and rejected in the Administrative Law Judge's decision (Decision at 3-11).

We observe that 43 CFR 4.1273(c) requires an appellant's brief to the Board to "state specifically the rulings to which there is an objection, the reasons for such objection, and the relief requested. The failure to specify a ruling as objectionable may be deemed by the Board as a waiver of objection." We do not regard repeating verbatim to the Board the arguments made to the Administrative Law Judge complies with this regulation because it does not provide reasons for the objections. Although the Board may and does review matters "as fully and finally as might the Secretary," 43 CFR 4.1, see United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983), we are not interested in this kind of argumentation. Had we announced this view explicitly before, we would deem Donaldson to have waived objection to the rulings on these six arguments. Hereafter appellants will be on notice that we require a brief to state reasons why an Administrative Law Judge's rulings are incorrect. Under the circumstances we will review Donaldson's arguments briefly.

[2] Donaldson argues that OSMRE does not have authority to issue an NOV on the basis of a routine inspection in a state such as Kentucky with a state program that has been approved in accordance with 30 U.S.C. § 1253 (1982) because the NOV does not result from an inspection enumerated in 30 U.S.C. § 1271(a)(3) (1982). It is by now well settled that "[a] state's jurisdiction for enforcement of an approved program is primary, but not exclusive," Mario L. Marcon, 109 IBLA 213, 217 (1989), and that OSMRE is authorized to issue an NOV under 30 U.S.C. § 1271(a) (1982) and 30 CFR 843.12(a)(2) when a state fails to take appropriate action in response to a 10-day notice. Willowbrook Mining Co. v. OSMRE, 108 IBLA 303, 312 (1989); Hazel King, 96 IBLA 216, 237, 94 I.D. 89, 100-101 (1987); Peabody Coal Co. v. OSMRE, 95 IBLA 204, 208-14, 94 I.D. 12, 15-18 (1987).

[3] Donaldson argues that OSMRE is estopped under United States v. Georgia-Pacific Co., supra, from requiring it to eliminate the submerged highwall. One element for invoking estoppel is that the person asserting
it must be ignorant of the true facts, however. Terra Resources, Inc., 107 IBLA 10, 13 (1989). 30 CFR 715.14(e) has been in effect since December 13, 1977, and Donaldson is charged with knowledge of it, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947), so Donaldson

cannot be ignorant of its requirements. Further, OSMRE's alleged failure to comment during inspections on the requirement that an underwater highwall must be graded to the appropriate contour does not constitute affirmative misconduct. Shelbiana Construction Co. v. OSMRE, 102 IBLA 19, 22-23 (1988).

[4] Donaldson argues that OSMRE may not retroactively impose on it a "new enforcement policy contrary to its regulation." The regulation applicable to Donaldson's initial program surface mining operation is 30 CFR 715.14(e), however, not 30 CFR 816.49(a)(9), which applies to permanent program operations. The initial program regulation requirement that a permanent impoundment could exist, provided that all highwalls were eliminated by grading to appropriate contour and that the provisions for postmining land use and protection of the hydrologic balance were met, was in effect throughout the period of Donaldson's mining and reclamation and remains in effect. The requirements of 30 CFR 816.49(a)(9) are different, and OSMRE had no business including them in a notice of violation concerning an initial program operation, whatever its then-current policy or litigation strategy was. Revising the corrective action in the NOV to conform to 30 CFR 715.14(e) was not a retroactive imposition of a new requirement, but, rather, a statement of the requirements that had always been applicable. OSMRE was mistaken in instructing Wyatt to depart from those requirements in writing the corrective action portion of the NOV, but Donaldson's failure to comply with those requirements antedated issuance of the NOV by several months, so it cannot legitimately complain about the imposition of the correct requirement.

[5] Donaldson argues there is no violation because it complied with the requirements of the permit issued by the Commonwealth of Kentucky, which permitted it to leave an underwater highwall in the impoundment, and there is no time limit stated in the regulation within which the impoundment must fill to cover the highwall. 30 CFR 715.14(e) requires that all highwalls in permanent impoundments be eliminated by grading to appropriate contour. Cf. Wayne Yarnell, 3 IBSMA 188, 195, 88 I.D. 652, 656 (1981). The evidence in the record clearly shows that a highwall remains at the Donaldson No. 1 Mine (Exh. P-8, Exh. R-8). It is well established that compliance with the terms of a permit issued by a state cannot excuse failure to comply with the requirements of the initial program regulations. Greater Pardee, Inc., 3 IBSMA 313, 88 I.D. 846 (1981); Rayle Coal Co., 3 IBSMA 111, 88 I.D. 492 (1981); Alabama By-Products Corp., 1 IBSMA 239, 86 I.D. 446 (1979); Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979).

[6] Donaldson argues that OSMRE is collaterally estopped from attempting to revise its permit allowing an underwater highwall by enforcing the requirement of 30 CFR 715.14(e) that all highwalls be eliminated by grading to appropriate contour. A state's permit review process is analogous to a state enforcement decision, i.e., a state administrative agency acting in a judicial capacity, that may not be relitigated once it has become final,
Donaldson argues, citing United States v. ITT Rayonier, Inc., 627 F.2d 996
(9th Cir. 1980), and Excello Coal Corp. v. Clark, No. CIV-3-84-902 (E.D.

Tenn. Dec. 27, 1984). 10/ The approval of a permit application by a state agency is not analogous to litigation by a state agency, however, so the doctrine of collateral estoppel does not apply. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[7] Finally, Donaldson argues OSMRE's enforcement action against it was discriminatory and based on an improper motive, and complains it was not allowed to present evidence in support of this charge. We do not consider erroneous the Administrative Law Judge's refusal to take evidence on the issue whether OSMRE failed to enforce the requirement to grade underwater highwalls to appropriate contour at other sites, or began its enforcement of 30 CFR 715.14(e) with Donaldson, however. Donaldson's mining and reclamation of its No. 1 Mine were conducted during the initial regulatory program; it was therefore required to comply with 30 CFR 715.14(e). Turner Brothers, Inc. v. OSMRE, 103 IBLA 10, 16 (1988). The fact that OSMRE may not have enforced this regulation elsewhere, even if it were demonstrated, would not excuse Donaldson's failure to comply with it. David A. Gitlitz, 95 IBLA 221, 224 (1987), and cases cited. Cf. United States v. Rice, 73 IBLA 128, 132 (1983). 11/

10/ For the subsequent history of the Excello case, see Bernos Coal Co. and Excello Land & Mineral Corp. v. OSMRE, 97 IBLA 285 (1987), rev'd Bernos Coal Company and Excello Land & Mineral Corp. v. Lujan, No. CIV-3-87-437 (E.D. Tenn. June 6, 1989), appeal filed Aug. 4, 1989, No. 89-6000 (6th Cir.).

11/ "It is not the function of the Board to inquire into the motivation of any Government agency which has recommended the initiation of a contest against mining claims. Even if questionable motives were established, the Board would adjudicate the validity of the claims. The fact that particular claims, but not others in the same general area, are contested does not constitute a denial of due process. United States v. Howard, 15 IBLA 139 (1974), and cases there cited." United States v. Rice, supra at 132.

United States v. Howard, supra at 145, refers to the discussion of "asserted discriminatory action" in United States v. Zuber, 13 IBLA 193, 197 (1973):

"The essence of appellants' position, as they state in their brief, 'is that valid laws and regulations are being enforced in invalid and discriminatory ways.'

"The only case relied on by appellants is Yick Wo v. Hopkins, 118 U.S. 356 (1886). Yick Wo, however, is distinguishable. In Yick Wo, a San Francisco ordinance vested discretion in a board of supervisors to grant or withhold their assent to the use of wooden buildings as laundries to protect the public from dangers of fire. The supervisors withheld their
assent from Yick Wo and 200 others of Chinese ancestry, but permitted non-Chinese to carry on the same business under similar conditions. The Supreme Court concluded that the ordinance was constitutional on its face, but unconstitutional in its application since it was applied on the basis of racial discrimination. The Supreme Court pointed out that the petitioners in Yick Wo, 'have complied with every requisite, deemed by the law or the public officers charged with its administration, necessary to the protection of neighboring property from fire * * *.'

"* * * Unlike the petitioners in Yick Wo, appellants have failed to comply with the requisites of the law."

[8] We therefore conclude that Donaldson's arguments against the revision of the remedial action prescribed in the NOV and CO cannot prevail. As noted above, 30 CFR 715.14(e) provides that permanent impoundments may be retained "provided all highwalls are eliminated by grading to appropriate contour." The Interior Board of Surface Mining and Reclamation Appeals held that "appropriate contour" is "not synonymous with 'approximate original' contour," Wayne Yarnell, supra, 3 IBSMA at 195, 88 I.D. at 656. The regulation clearly requires that all highwalls be eliminated by grading, however, although the grading need not return the lands under water to the approximate original contour. Because Donaldson did not eliminate the highwalls in the impoundment, or even attempt to do so, it was properly cited for a violation of 30 CFR 715.14(e), and the Administrative Law Judge's decision concluding that the notice of violation and cessation order were properly issued and upholding the civil penalties based on them must be affirmed. Although it is clear that the permanent program regulation, 30 CFR 816.49(a)(9), allows highwalls to remain below the low-water line so long as adequate safety and access for proposed water users is assured, the record indicates more than thirty feet of highwall remained above the water in Donaldson's impoundment when it was inspected, so the site was not in compliance with this regulation even if it were applicable. 12/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

12/ The testimony in the record was that the impoundment structure was leaking and that the water level had not risen during the time OSMRE had been observing the site (Exhs. R7-R9; Tr. 50-54, 57-58, 62-66, 108-11).

The record also contains testimony indicating that, even if the impoundment did completely fill as planned, the slopes immediately adjacent to the impounded water would be too steep to allow cattle to graze safely without risk of falling into the water (Tr. 57, 111-12, 119).